

ANA

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State Advertising Tax Deductibility
Privacy and Consumer "Pushback"
The FTC's "Do-Not-Call" Registry
Unsolicited Commercial Faxes
Unsolicited Commercial E-Mail (Spam)
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Advertising
Food Advertising and Obesity
Alcohol Beverage Advertising
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International Developments
Key Court Cases
Coalitions

Compendium of Legislative, Regulatory and Legal Issues

2004

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Table of Contents

- Introduction**1
- The Election’s Impact on Marketers**5
- Advertising Tax Deductibility**7
- State Advertising Tax Deductibility**9
- Privacy and Consumer “Pushback”**12
 - Privacy12
 - Children’s Privacy12
 - Spyware12
- The FTC’s “Do-Not-Call” Registry**14
- Unsolicited Commercial Faxes**16
- Unsolicited Commercial E-Mail (Spam)**18
- Media Content and Child Protection**20
- Direct-to-Consumer Prescription Drug Advertising**23
- Food Advertising and Obesity**26
- Alcohol Beverage Advertising**29
- Tobacco Advertising**32
- International Developments**34
- Key Court Cases**36
 - Alcohol Beverage Advertising36
 - Direct-to-Consumer Prescription Drug Advertising37
 - “Do-Not-Call”38
 - Tobacco Advertising38
 - Beef Marketing Case39
- Coalitions**40

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Introduction

The Washington, DC government relations office of the Association of National Advertisers faced growing challenges in 2004. These challenges included: a noticeable increase in attacks on food advertising and children's marketing; numerous efforts to restrict advertising on the state level; attempts to limit advertising for various product categories, including alcohol beverages, prescription drugs and tobacco products; and a number of attempts to limit commercial speech in the name of consumer protection. Below is a summary of the most serious challenges that we confronted in the past year.

- **Study on the Economic Impact of Advertising:** In November, The Advertising Coalition, of which ANA is a founding member, released a study by Global Insight, a highly regarded economic research group, that focused on the value of advertising to the nation's economy. The study disclosed that advertising will represent more than \$5 trillion in economic activity out of a total of \$21 trillion in total United States sales. Direct and indirect advertising activity also will be responsible for 15.2 percent of the total jobs in the United States in 2005.
- **Obesity, Food Advertising and Children's Marketing:** In March, ANA's CEO, Bob Liodice, testified at a Senate Commerce Committee Competition, Foreign Commerce and Infrastructure Subcommittee hearing on the rise of obesity in children. Also, Dan Jaffe, ANA's Executive Vice President for Government Relations, participated in a Cato Institute panel in June regarding marketing to kids. At the panel, he presented detailed data obtained from Nielsen Media Research and analyzed by ANA and the Grocery Manufacturers of America. This data showed that overall spending on food, beverage, and restaurant ads has declined in real terms since 1993, and that the number of ads in these same categories viewed by children during this period also declined. The study demonstrated that the alleged increase in food advertising is inaccurate and that advertising is unlikely to be a significant cause of increased obesity in the U.S. However, before Congress left for the campaign season in October, Senator Ted Kennedy (D-MA) introduced legislation that called for an Institute of Medicine (IOM) study that recommends guidelines on food advertising directed at children. The bill would give the FTC the ability to enforce the guidelines, including assessing fines for violations. ANA also responded to a "blue ribbon" panel in Maine that proposed a ban or tax on food ads to children. The panel rejected a proposal for a tax on food ads but approved a recommendation for a ban on food ads on TV.
- **Broadcast Indecency and Violence:** In the wake of the Super Bowl halftime show controversy, there was an increased Congressional focus on indecency, and ultimately, violence on the airwaves. Senator Fritz Hollings' (D-SC) "safe harbor" media violence bill was attached, along with provisions regarding indecency fines, to the Defense Authorization bill. The violence and indecency provisions were removed from the bill in the House-Senate conference. The final version of the bill was passed in October. ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising

Federation (AAF), sent a letter to the Senate Commerce Committee stating our opposition to this proposal. We also had Robert Corn-Revere of Davis Wright Tremaine, LLP prepare a memo detailing the significant limits the proposal would place on television programming, which the study concluded would be unlikely to withstand a legal challenge. Mr. Corn-Revere also prepared a filing to the FCC on behalf of ANA and other groups in the advertising community regarding the FCC's on-going violence inquiry.

- **State Advertising Taxes:** There were six new state advertising tax proposals, and two additional proposals at the municipal level, in 2004. Also, two ad tax proposals carried over into 2004 from 2003's unprecedented number of 17. These two proposals were from Texas and New Jersey. ANA forcefully responded in opposition to these initiatives. In New Jersey, for example, the 6% billboard ad tax passed into law in 2003 will be phased out incrementally and then completely phased out by 2007. Texas considered its school financing problems in a special session, and the Texas House passed a bill that would have imposed the sales tax on billboard advertising and newspaper inserts. However, the special session ended without an agreement. Ad tax proposals also arose in Arkansas; Florida; Maine; Maryland; Nebraska; Virginia; Tucson, Arizona; and South San Francisco, California.
- **Tobacco Advertising:** The attempt to grant the Food and Drug Administration (FDA) authority over tobacco products and tobacco advertising gained steam in 2004. The FDA provisions, along with a "buyout" of the Depression-era tobacco quota program, were linked to a bill relating to corporate tax procedures which had caused European Union sanctions on American imports. The FDA provisions were stripped out of the bill in the House-Senate conference, while the buyout remained intact. Congress passed the final bill in October. ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), sent a letter to the relevant House and Senate committees stating our opposition to the advertising provisions of the FDA proposal. ANA also hired Patton Boggs, LLP to draft a detailed memorandum describing the numerous unconstitutional aspects of the advertising restrictions.
- **Direct-to-Consumer Prescription Drug Advertising:** There were continued attempts to disallow the ad tax deductibility of DTC advertising in 2004. The legislation that created the greatest concern was introduced by Senator Charles Grassley (R-IA), Chairman of the Senate Finance Committee. His bill made the ad tax deduction contingent on a drug company's actions regarding reimportation of prescription drugs from other countries. Burt Neuborne, John Norton Pomeroy Professor of Law and Director of the Brennan Center for Justice at the New York University School of Law drafted a memo for ANA detailing the constitutional problems with Senator Grassley's proposal. Also, Senator John Edwards (D-NC), the Democratic Candidate for Vice President, again proposed his legislation to add crippling disclosure requirements to DTC ads. Late in 2004, AstraZeneca was sued by a coalition of labor and seniors groups in California over its advertising for Nexium, a drug that treats acid reflux disease. This case raises the question whether it is merely an isolated incident or just the opening salvo in a broader assault against prescription drug advertising utilizing California's extraordinarily broad consumer protection statute.
- **Privacy and Consumer "Pushback:"** While the general debate over privacy remained in the background for most of the year, there was action on two related issues: children's privacy and spyware. There were also activities related to the consumer "pushback" on

“do-not-call,” “do-not-fax,” and “do-not-e-mail” issues. The Supreme Court declined to hear a challenge to the Federal Trade Commission’s “do-not-call” list. Unsolicited fax legislation also was considered, and the Federal Trade Commission (FTC) weighed in against a “do-not-e-mail” registry.

- **Alcohol Beverage Advertising:** The Oregon Liquor Control Commission was asked to consider a proposal (later withdrawn) to limit alcohol beverage advertising in that state. Challenges continued at the federal level, including a resolution introduced by Rep. Tom Osborne (R-NE/3) asking the NCAA to halt alcohol beverage advertising during its sports broadcasts. The ANA, AAAA and AAF strongly opposed the resolution. The Center on Alcohol Marketing and Youth (CAMY) continued to release a barrage of studies critical of the industry’s ad placement practices.
- **International Developments:** ANA filed comments with the Codex Committee on Food Labeling countering attempts to extend the rules regarding labeling to advertising. We also notified our members about a plan to tax advertising to children in France. Dan Jaffe participated in an international WFA conference in Chile in May, at which he discussed the attacks on advertising in the U.S. to an international audience drawn from 40 countries.
- **Legal Affairs Committee:** Dan Jaffe and Doug Wood, ANA’s General Counsel, helped to launch the creation of ANA’s Legal Affairs Committee in 2004. Its goal is to address, discuss, and seek solutions to the myriad of legal issues advertisers face that relate to challenges to their advertising content and practices. The Committee’s first conference, the Advertising and the Law Conference, will be held in January in New York City.

This is just a brief summary of the issues we confronted in 2004. More details can be found in the pages that follow. We will continue actively monitoring developments on these issues and any others which may arise.

If you have any questions about these issues, please contact Dan Jaffe in ANA’s Washington, DC office at 202-296-1883 or at djaffe@ana.net. We also continually post updates on these issues, and any other legislative, regulatory and legal issues that we are tracking on our website at <http://www.ana.net/govt/govt.htm>.

The Election's Impact on Marketers

The election of 2004 saw the reelection of President George W. Bush and increased Republican control of the Senate and House of Representatives. It was the first time since 1988 that the winning Presidential candidate received a majority of the popular vote. The Republicans also gained four seats in the Senate and three in the House.

There will be some important changes in Congress, especially in the Senate. Senator Ted Stevens (R-AK) takes over the Senate Commerce Committee from Senator John McCain, who is term-limited under Republican Conference rules. Senator Daniel Inouye (D-HI) will become ranking member of the Commerce Committee, replacing the retired Senator Fritz Hollings (D-SC). Also important for advertisers, considering the very real potential of a Supreme Court vacancy in the near future, is the leadership of the Judiciary Committee, where Senator Arlen Specter (R-PA) will take over from the term-limited Senator Orrin Hatch (R-UT).

Taking the broad view the strengthened Republican majority and the President's aversion to new taxes probably reduces the threat of an across-the-board advertising tax in the immediate future. A number of controversial issues, however, are likely to come up in the 109th Congress. These include prescription drug advertising, food and children's marketing, privacy, and initiatives concerning media indecency and violence.

Even with the defeat of Senator John Edwards (D-NC), the scrutiny of prescription drug advertising will continue. The issue of reimportation of prescription drugs remains unresolved. Senator Charles Grassley (R-IA), the Chairman of the Senate Finance Committee, proposed restrictions on DTC advertising if a company takes any steps to impede reimportation. Also, House Ways and Means Chairman Bill Thomas (R-CA) has been critical of DTC advertising in the past.

We also expect privacy issues to return to the forefront this year. Over the past few years, the focus has been on "do-not-call," "do-not-email," and "do-not-fax" legislation and regulation rather than information collection practices. Nevertheless, consumer surveys show continuing consumer concern about how information is collected and used by marketers. In addition, Energy and Commerce Committee Chairman Joe Barton (R-TX) will have his first full Congress at the helm and is likely to more actively pursue his privacy agenda. Chairman Barton has expressed serious reservations in the past about current practices of the business community in protecting consumer privacy.

With ever increasing attention on the obesity problem in America, the spotlight on food advertising and children's marketing is almost certain to increase as well. Senators Tom Harkin (D-IA) and Ted Kennedy (D-MA) both introduced bills last Congress to restrict food marketing, and we expect these types of bills to be reintroduced this year. Also, in a clear example of how politics makes strange bedfellows, two of the Senate's most conservative members (Republican Senators Sam Brownback of Kansas and Rick Santorum of Pennsylvania) joined with two of the most liberal members (Democratic Senators Hillary Clinton of New York and Joe Lieberman of Connecticut) to support funding for research on the impact of marketing and media on child development. The legislation further included a pilot study on the impact of media and advertising on children's obesity rates.

Finally, one of the most noted story lines of the past election was the one-fifth of the electorate who listed “moral issues” as the main reason for their vote, ahead of terrorism, the economy and the war in Iraq. The values agenda moved to the political forefront early in the year with the controversy over Janet Jackson’s Super Bowl appearance. Senator Sam Brownback (R-KS) and Congressman Fred Upton (R-MI) both introduced bills to crack down on broadcast indecency. The bills were later coupled with provisions to limit violent entertainment. This package of amendments was initially added to the Defense Authorization bill, but later was dropped before passage in July. In a sign that the values issues will remain on the political agenda, another controversy blew up in November after ABC aired a risqué “Desperate Housewives” promo on Monday Night Football. The FCC has stepped up its focus on media content, and is expected to issue a report on violence in the media by early January 2005.

Despite the substantial changes in the Congress and the Executive branch that have flowed from the 2004 elections, there is still reason to believe that a broad range of advertising issues will be the focus of Congressional scrutiny and action in the 109th Congress.

Advertising Tax Deductibility

Background

Since the inception of the income tax code, advertising expenses have been tax deductible at the federal level as a cost of doing business. This exemption is vitally important for the ad community. While it has been nearly 14 years since an across-the-board advertising tax was considered, ANA has continually faced a number of category-specific advertising tax proposals each year. These proposals recently have been targeted at direct-to-consumer prescription drug advertising and tobacco advertising. As a member of The Advertising Coalition, ANA and the advertising community have worked forcefully to ensure that advertising retains its current tax status. We have tried to educate members of Congress and policy makers on why it would be misguided to limit or eliminate advertising deductions. We remain strongly opposed to any attempt to ban or restrict the tax deductibility of advertising.

Status

A debate over reimportation of prescription drugs from other countries as a means to lower drug prices was a major issue in 2004. Some of these proposals included provisions to restrict ad tax deductibility for direct-to-consumer prescription drug advertising. One of these proposals was sponsored by Senator Charles Grassley, the Republican Chairman of the Senate Finance Committee. Chairman Grassley's bill, the Reliable Entry for Medicines at Everyday Discounts through Importation with Effective Safeguards Act of 2004 (or REMEDIES Act, S. 2307), included a provision to take away the tax deduction for advertising expenses from any company that carried out a "direct or indirect" action to impede reimportation. Companies that did not take such actions would get a tax credit on research and development (R & D) expenses. Another reimportation proposal that would have disallowed the tax deduction was introduced by Senators Olympia Snowe (R-ME) and Ron Wyden (D-OR). Also in the House, a number of bills to disallow the tax deductibility of DTC advertising were carried over from the previous session.

In response to the Grassley proposal, we retained Burt Neuborne, a noted First Amendment scholar and Professor of Law at New York University to draft a memo detailing the serious constitutional problems inherent in restricting speech to force a speaker to take governmentally-approved action. This analysis was provided to the key legislators involved in the reimportation debate.

Senator Tom Harkin also introduced a bill that would restrict tax deductibility (S. 2558), but his bill targeted tobacco advertising. This legislation also granted regulatory authority over tobacco advertising to the Food and Drug Administration.

Global Insight Study

This year, we acquired major new ammunition in our fight against ad taxes. In 1997, the WEFA Group conducted a study on behalf of the Advertising Tax Coalition (ATC) that examined the economic impact of advertising on each Congressional district in the United States. The Advertising Coalition had Global Insight, WEFA's successor, conduct a far more detailed follow

up study this year. This study demonstrated the continued vital importance of advertising to the American economy. It found that the more than \$278 billion projected to be spent on advertising in the U.S. in 2005 will produce more than \$5 trillion in economic activity out of a total of \$21 trillion in total sales. In other words, over 20.5% of all economic activity in the U.S. is directly attributable to advertising. Like the original study, the Global Insight study demonstrates that advertising has a major economic impact on every Congressional district in the country.

As staggering as these numbers are, advertising's impact on jobs throughout this country is at least as important. The study found that advertising will generate over 21,117,903 jobs in the United States in 2004, which is 15.2 percent of the U.S. job total.

The study data on advertising's economic impact on New York City were initially presented during Advertising Week in New York City in September. The national numbers were released in November. We also held regional roll-outs of the study in six cities to increase the awareness of the economic impact of advertising across the country. These areas included Atlanta, Chicago, Houston, Los Angeles, Miami and San Francisco.

Next Steps

Federal ad tax threats undoubtedly will persist. The federal government faces rapidly growing deficits well into the future. If past history is a guide, there will be those in the Congress who will begin to look at the elimination of ad tax deductions as a potential source of new revenue. In addition, in his first press conference after his reelection, President Bush mentioned that his second term includes plans for a substantial overhaul of the tax code. These alterations also might impact ad tax deductions. Furthermore, as is clear from the DTC prescription drug advertising and tobacco advertising examples in 2004, ad taxes too often are seen as a way of limiting advertising that is considered "controversial." Because of the Global Insight study, we now have significant data which underlines the importance of advertising to our economy. This study will be a powerful tool to demonstrate to lawmakers why the ad tax deduction should be maintained for all products and services.

State Advertising Tax Deductibility

Background

The past two years have been extremely active for ANA at the state level. Many states faced budget deficits as a result of the economic downturn in 2001. This downturn led to an explosive growth in advertising tax proposals, as many states looked for new ways to raise revenue. In 2003, we faced proposals in 17 states, with the most serious threats in Connecticut, Texas and New Jersey. Connecticut actually passed a 3% tax on creative services which was later repealed. ANA, as a member of the State Advertising Coalition (SAC), has worked to defeat over 100 advertising tax proposals, in nearly every state, since 1987. Our membership in The Advertising Coalition has also been instrumental in this fight.

Status

The ad tax proposals in Texas and New Jersey carried over into 2004. This year we confronted new initiatives that arose in six additional states. We also dealt with advertising tax proposals at the municipal level, in Tucson, Arizona, and in South San Francisco, California. Below is a summary of each of these proposals:

- **Arkansas:** The Arkansas General Assembly held a nine-week special session on education reform and finance issues, during which there were several advertising tax proposals discussed. This included House Bill 1185 which proposed to tax all media with gross advertising billings over \$5 million. The bill, introduced on the last day of the special session, failed by only five votes. The final reform package raised the sales tax and extended it to a number of personal services. However, the Arkansas House leadership has made a commitment to a number of state legislators to conduct a study exploring taxes on advertising and other services.
- **Florida:** In 2003, three prominent former elected officials - former Senate President John McKay, former Senator Jack Latvala and former Comptroller Bob Milligan – began a petition drive to place a proposed constitutional amendment on the state ballot to require a decennial review of all sales tax exemptions. The proposal would have required a three-fifths vote in the legislature for exemptions to be reinstated. Any exemption not reinstated would be eliminated. Florida's attorney general contested the petition drive, and the Florida Supreme Court concluded in July that the proposed sales tax overhaul violated the state's single-subject rule for constitutional amendments and did not adequately inform voters of the consequences of the amendment. ANA and the business community were spared the need for a costly challenge to this amendment.
- **Maine:** Two members of the Joint Taxation Committee, Senator Ethan Strimling (D-Portland) and Representative Arthur Lerman (D-Augusta), proposed extending the state sales tax to all advertising, with the revenue to be earmarked for health care programs, higher education or property tax relief. No formal bill was introduced and the proposal died. In August, however, a "blue ribbon" commission established by the Maine Legislature to consider steps to address obesity recommended a tax on all broadcast adver-

tising for foods “other than healthy foods and beverages.” The revenues from this tax were to be utilized to fund an anti-obesity media campaign. ANA filed testimony in opposition to the plan (our testimony can be viewed at <http://www.ana.net/pdf/mainletter.pdf>). The Commission voted on its final recommendations in November. It unanimously opposed taxing food advertising, while adopting other proposals calling for limits on ads directed to children.

- **Maryland:** During budget negotiations in the Maryland General Assembly in April, a tax on advertising was considered as a revenue option. The final budget agreed to by Governor Robert Ehrlich (R) and the General Assembly did not contain a tax on advertising.
- **Nebraska:** LB1025 would have reduced the sales tax rate and extended the tax to cover a number of business services, including advertising agency, public relations and marketing services. There was substantial opposition from the business community, including members of ANA, at a Revenue Committee hearing on the bill in February. The legislation died and a budget was adopted with no new taxes on advertising services imposed.
- **New Jersey:** In 2003, the New Jersey Legislature passed a one-year gross receipts tax of 6% on all billboard advertising in the state. The tax originated in large part in response to a scandal involving billboard owners and advisors to former Governor James McGreevey (D), but also to help close a significant budget deficit. The budget bill passed in June for Fiscal Year 2005 reached a compromise, extending the tax through June 30, 2007, reducing the rate to 4% for FY2006, and then phasing it out completely.
- **South San Francisco, California:** The City Council of South San Francisco approved a ballot initiative that would authorize an 8% tax on all billboard advertising. The revenue from the tax was earmarked to fund recreation, public safety and library services. The proposal, which needed a two-thirds vote to pass, received 65.3% of the vote on November 2nd, falling short by just over 1%.
- **Texas:** In 2003, the Texas Senate passed a school finance reform bill that would have raised the state sales tax by one percent and imposed it on almost all services in the state, including advertising. The bill later died in the House of Representatives. In response, Governor Rick Perry (R) announced he would call a special session in 2004 to address school finance issues. This special session began in late April, with both the House and Senate considering different school financing plans. In early May, the House narrowly passed a bill that would have raised the sales tax rate from 6.25% to 7% and extended the tax to all billboard advertising and certain newspaper ad inserts. The Senate, however, could not reach a consensus on a plan. The special session ended without an agreement. While a Joint Select Committee on Public School Finance has continued to meet since the end of the special session, it is no closer to a consensus on how to change the state’s system for funding schools. School finance reform proposals will not come up again until the Texas Legislature’s regular session in January. In the meantime, a Texas district court judge ruled in September that the state’s school finance system is unconstitutional and gave the Texas Legislature one year to fix it. This decision will put more pressure on the legislature to work on a reform package. ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), retained a highly-regarded lobbyist in Austin to protect the interests of the advertising community.

- **Tucson, Arizona:** Tucson considered a 2% tax on advertising published or broadcast within the city limits. It would have applied only to local advertisers. National advertisers whose ads appeared in Tucson would have been exempt. The proposal was defeated by a 4-2 vote of the City Council in June.
- **Virginia:** The Virginia General Assembly concluded its regular session this year without a budget agreement. During a special session, the House passed a budget plan that would have eliminated the sales tax exemptions for a number of industries, including all media. The Senate plan did not include an expansion of the sales tax. After weeks of negotiations, the General Assembly narrowly passed a budget plan that raised more than \$1 billion in new taxes but did not tax advertising. ANA worked closely with our member companies and the Virginia broadcasters and newspaper publishers to convince the Senate to reject the ad tax proposal.

ANA's Position

We believe that any type of advertising tax is damaging to a state's economy, as it is a burden on economic growth. When the effort to advertise is made more expensive, generally there are fewer ads, and those that remain are made less efficient. This dampens consumer demand. Ad taxes send an anti-business signal that is particularly detrimental to small businesses that rely primarily on advertising for visibility. It is also difficult to administer on a state level, as advertising is a complex field, encompassing millions of ads across a wide array of media. Arizona, Iowa, Florida and Connecticut all have enacted and later repealed some type of tax on advertising after experiencing these problems directly.

Next Steps

The National Conference of State Legislatures (NCSL) has reported that since 2001, the states have closed a collective \$235 billion budget gap. We are fortunate that we have been so successful in preventing advertising taxes from passing into law or becoming permanent. ANA has intervened in every major state ad tax battle. The NCSL did note, however, that states are "feeling pressure" to make up for past cuts to programs. In addition, there still will be demands on a number of states to find new sources of revenue. Thus, the advertising tax threat will persist for the foreseeable future and we will have to continue to be vigilant.

Privacy and Consumer “Pushback”

Privacy

Background

Consumer privacy, both offline and online, has been an important focus of ANA efforts for a number of years. How the debate is resolved will have profound effects on the ways in which marketers can reach consumers. The media marketplace has fragmented and this trend continues to accelerate with the growth of the Internet. More voices continue to clamor for the consumer’s attention. Consumers are pushing back against this torrent of information. This pushback has spurred a growing movement to block certain types of advertising messages, from “do-not-call,” to “do-not-e-mail,” to “do-not-fax.” It is up to marketers to find ways to target the right consumers. The information marketers collect and how they use it to reach out to consumers is a central part of the privacy debate.

Status

The debates over “do-not-call” and spam continued to overshadow the general privacy issue in the 108th Congress. There were, however, developments in two areas related to privacy in 2004: children’s privacy and spyware. Also, the change in leadership of the House Energy and Commerce Committee is likely to lead to an increased focus on privacy issues in coming months.

Children’s Privacy

The protection of children in cyberspace has been an issue since the Internet fully entered the national consciousness a decade ago. In 1998, Congress passed the Children’s Online Privacy Protection Act (COPPA), with the support of ANA. The FTC issued rules under the act which require websites directed at children 13 and under to post privacy policies. The rule also limits the collection, use and disclosure of personally identifiable information from children without the prior consent of their parent or guardian. COPPA has been an important tool in protecting the safety and privacy of children on the Internet.

But while COPPA addresses the collection of personally identifiable information from children, it does not address the sale of this information to others for marketing purposes. A bill introduced by Senators Ron Wyden (D-OR), Ted Stevens (R-AK) and Lisa Murkowski (R-AK) directly targets this issue. Their bill, the Children’s Listbroker Privacy Act (S.2160) would prohibit the sale or purchase of children’s personally identifiable information for commercial purposes without express parental consent. Any violation would be considered an unfair or deceptive act or practice under the FTC Act. Companion legislation was introduced in the House as H.R. 4955 by Rep. Darlene Hooley (D-OR/5). These bills died with the adjournment of the 108th Congress.

Spyware

The House of Representatives also initiated an assault on “spyware” in 2004. Spyware is software downloaded on to a user’s computer, usually surreptitiously, when the user installs another program or visits certain websites. The software then gathers information regarding the user’s web surfing habits and transmits this information to other parties.

There were two competing bills in the House. The first was Commerce, Trade and Consumer Protection Subcommittee Chairman Cliff Stearns’ Securely Protect Yourself Against Cyber Trespass Act, or SPY Act. This bill, H.R. 2929, was originally introduced by Rep. Mary Bono (R-CA/45) and Rep. Edolphus Towns (D-NY/10). This bill would make it illegal to alter a user’s computer settings, such as changing the user’s Internet browser home page, other Internet connection settings, or Internet bookmarks. It would also make it illegal to induce a user to install software by deceptive means. Additionally, users must receive “opt-in” notice when an information collection program is about to be installed on their computer and must give consent to the installation. The other bill in this area was the Internet Spyware (I-SPY) Prevention Act of 2004, sponsored by Rep. Bob Goodlatte (R-VA/6) and Rep. Zoe Lofgren (D-CA/16). Their bill, H.R. 4661 was not as broad as the Stearns/Bono/Towns proposal. It would target only the “bad actors” that use spyware to obtain and use personally identifiable information. The House passed both bills in October. The Senate, however, did not consider them before adjournment.

Other spyware legislation was introduced in the House by Rep. Jay Inslee (D-WA) and in the Senate by Sen. Conrad Burns (R-MT). Spyware legislation also was introduced in a number of states, including California and New York. Utah passed legislation in March that has been subject to a court challenge.

ANA’s Position

ANA has been an active supporter of a combination of efforts to protect consumer privacy. In the past, we have supported needed legislation such as COPPA, as well as private sector initiatives. These private sector initiatives include self-regulatory “best practices” programs and seal programs sponsored by TRUSTe, BBB Online and CPA Web Trust. It is important for businesses to ensure that consumer privacy is protected. We oppose broad privacy legislation that would impose an “opt-in” regime. We feel such legislation would severely limit the free flow of information between consumers and business that is vital for the economy. It is our concern that the spyware legislation that emerged from the House Energy and Commerce Committee may prove to be a back-door attempt to impose an “opt-in” regime. Under current laws, the Federal Trade Commission has the ability to adequately protect consumer privacy.

Next Steps

While the Senate did not pass spyware legislation before the end of the year, the issue undoubtedly will come up again early in the next Congress. We will keep a close watch on the legislation’s progress. It could be the opening salvo in a renewed debate over privacy. New House Energy and Commerce Committee Chairman Joe Barton (R-TX/6) has very strong views on privacy, and we expect that he will make sure that privacy issues are placed high on the legislative agenda.

The FTC's "Do-Not-Call" Registry

Background

The Federal Trade Commission (FTC) was authorized by Congress to devise and enforce regulations prohibiting abusive, deceptive and unwanted telemarketing calls. The rule promulgated under this authority, the Telemarketing Sales Rule (TSR), was substantially revised in 2002. These revisions included the creation of a national "do-not-call" registry. Consumers began signing up for the registry in June 2003, and telemarketers were required to comply with the registry's restrictions in September 2003. On the list's one year anniversary, 62 million phone numbers had been placed on the registry. The FTC has found that the vast majority of telemarketers are complying with the requirements of the registry.

Status

There were two challenges filed to the "do-not-call" list in Federal court. The first court challenge, appealed to the U.S. Supreme Court, *U.S. Security v. Federal Trade Commission* (Civil Action No. 03-122-W), alleged that the FTC had not been granted express authority by Congress to create a registry. The Congress reacted extremely quickly to this challenge by passing legislation providing explicit authority to the FTC in this area. In the second challenge, *Mainstream Marketing Services, Inc. v. Federal Trade Commission* (Civil Action No. 03-N-0184), the U.S. District Court for the District of Colorado found that the "do-not-call" registry, as implemented, violated the First Amendment. Using the four part test set forth in the U.S. Supreme Court's *Central Hudson* decision, the District Court judge found that the rules were an unconstitutional government restriction on commercial speech. The court ruled that the FTC was favoring one category of speech over others by instituting a content-based limitation on which calls the consumer could receive (as the rules did not restrict charitable or political calls). The FTC asked for a stay of the ruling, which was denied by the District Court but granted by the U.S. Court of Appeals for the Tenth Circuit.

The appellate court heard arguments in the case in November, and issued its ruling in February 2004. The appellate court ruled that the list did advance a substantial government interest, which is protecting consumer privacy and protecting consumers from fraud and abuse. It also held that the rules were narrowly tailored, as it did not block speech from those willing to hear it, only those who placed their number on the registry. It dismissed the District Court's argument that it favored one form of speech over another, stating that the First Amendment "does not require that the government regulate all aspects of a problem before it can make progress on any front." An appeal was filed with the U.S. Supreme Court. The Court declined to hear the case in October.

Next Steps

The success of the “do-not-call” registry was one of the first major signs of a concerted consumer pushback against messages that they do not want to hear or see. The FCC’s changes to its “do-not-fax” rules, the push to create a “do-not-email” list designed to try to mimic the “do-not-call” list, and commercial blocking technologies are all further manifestations of this movement. It is becoming increasingly hard for advertisers to reach consumers, which creates a growing need to develop new and innovative ways to reach the public in a consumer friendly manner. ANA is working with its members to pursue and examine these issues carefully.

Unsolicited Commercial Faxes

Background

The Federal Communications Commission (FCC) was given the authority over commercial faxes under the Telephone Consumer Protection Act (TCPA) of 1991. The rules the FCC issued under the authority regulating unsolicited commercial faxes included an important exception. This exception stated that an “established business relationship” with a recipient was sufficient for a marketer or advertiser to send an unsolicited fax. In 2002, however, the FCC determined that the established business relationship exemption was not specifically authorized under the TCPA. It issued a Report and Order changing the rules, requiring that prior express written permission be obtained from the potential recipient of a commercial fax before it could be sent. The new rule was to take effect August 25, 2003. A large number of ANA members warned that this change in the rules would have broad adverse consequences on business, making many basic fax communications more expensive and onerous. Consequently ANA, along with the American Association of Advertising Agencies (AAAA) and the National Association of Broadcasters (NAB) filed a Petition for Reconsideration or Clarification with the FCC stating our strong opposition to the rule change (the petition can be viewed at http://206.112.94.245/govt/what/AAAA_ANA_NAB_petition.pdf.) Due to the largely negative response to its proposed changes to the fax rule, the FCC delayed implementation of these rules until January 1, 2005.

Status

While the FCC temporarily delayed final action, Congress stepped in to try to ameliorate the situation. In June, Congressmen Fred Upton (R-MI/6), Joe Barton (R-TX/6), John Dingell (D-MI/15) and Edward Markey (D-MA/7) sponsored HR. 4600, the Junk Fax Prevention Act of 2004. Hearings were also held in June. The bill includes a provision that would write the established business relationship exemption into law. Additionally, it would require an opt-out to be included in all unsolicited faxes, and makes it clear that transactional faxes are not unsolicited. The legislation passed the House under suspension of the rules in July. A similar Senate bill, S. 2603, was introduced by Senators Gordon Smith (R-OR), George Allen (R-VA), Fritz Hollings (D-SC) and John Sununu (R-NH). This bill was reported out of the Senate Commerce, Science and Transportation Committee before the August recess. There were several efforts to pass the Senate bill in the closing days of the session. An amended version of the bill passed the Senate after the House had already adjourned for the year.

ANA's Position

Faxes are one of the many ways businesses communicate with consumers and each other. The FCC's rules requiring prior written consent before sending any commercial fax would create huge headaches for business, especially smaller ones. It would be extremely expensive to implement and maintain, as companies would have to send out and then keep track of numerous consent forms. ANA, among many others, registered our opposition with the FCC. The FCC has delayed implementation of the new rules for another six months, to July 1, 2005.

Next Steps

Both the House and Senate have passed bills to fix the FCC rule. We are continuing to work with a broad industry coalition to encourage passage and enactment soon after the new Congress convenes.

Unsolicited Commercial E-Mail (Spam)

Background

The number of unsolicited commercial e-mails received by consumers continues to rise. It was estimated in mid-2004 that spam now makes up as much as 65% of all e-mail traffic. Consumers continue to be deeply frustrated by the amount of spam in their inboxes. ANA has been active in working towards a solution to the spam problem. Last year, we worked to ensure passage of the federal CAN-SPAM Act. The CAN-SPAM Act clearly sets forth a distinction between legitimate commercial e-mail and spam. Under the law, the Federal Trade Commission (FTC) has new tools to use in going after senders of fraudulent and deceptive spam. In fact, the FTC took its first actions using the authority granted to it under the act in April. We have been active in getting industry to do its part to combat fraudulent and deceptive spam. In conjunction with the American Association of Advertising Agencies (AAAA) and the Direct Marketing Association (DMA), we issued our own self-regulatory guidelines for e-mail marketing best practices. These guidelines provide our members who use e-mail marketing guidance on how to use it in a way that keeps this important aspect of commerce viable. We also provided our members with guidance on complying with the CAN-SPAM Act.

Status

The CAN-SPAM Act called for a report from the FTC regarding the feasibility of a “do-not-e-mail” registry, based on the model for the “do-not-call” list. In response, the FTC asked for comments from the public about the “do-not-e-mail” list. We filed comments with the FTC, stating our concern that the most egregious spammers would never comply with such a list, so it would not reduce the spam that consumers find objectionable. We argued that instead, the registry would open up consumers to new and greatly expanded privacy risks, because protecting the integrity of the do not e-mail list would be virtually impossible to ensure.

The Commission issued its final report to Congress in June. It wrote that without a way to authenticate the origin of e-mails, a “do-not-e-mail” list would not reduce spam. It proposed an authentication summit in September to analyze the possibilities of developing an effective standard. It also found that, after looking at three possible registry models, none could be enforced effectively at this time. Despite these concerns, proponents of a “do-not-e-mail” registry, such as Senator Charles Schumer (D-NY), are continuing to press for the implementation of a registry. The FTC’s report can be viewed at <http://www.ftc.gov/opa/2004/06/canspam2.htm>.

Also as required by the CAN-SPAM Act, the FTC this year issued a final rule requiring senders of adult-oriented commercial e-mail to put a label in the subject line to identify its content clearly. It also conducted a rulemaking to define the “primary purpose” of e-mails, to assure that it falls within the definitions of the CAN-SPAM Act. This rulemaking is ongoing.

ANA’s Position

The passage of the CAN-SPAM Act was just the first step in the battle to combat fraudulent and misleading spam. The FTC is already putting to use the tools it acquired under the law to go

after those who are abusing the inboxes of consumers. It will take more than this effort, however. The cooperation of government, business, and the development of technological solutions will be required to combat spam. As noted earlier, the so-called “bad actors” in this area will not comply with a “do-not-e-mail” registry, nor will they comply with an opt-in regime. Instead, such requirements only will harm legitimate marketers who will face dramatically increased costs due to restrictive rules.

Next Steps

The threat that a “do-not-e-mail” registry and a mandatory regime will be pushed by members of Congress remains high. It is going to take time to develop an effective strategy to deal with fraudulent and misleading spam. The FTC has taken the right steps in this area. We worked hard since the passage of the CAN-SPAM Act to educate our members on how to comply with the law and about the “best practices” of commercial e-mail. We will continue our efforts to insure that e-mail remains a valuable tool for marketers.

Media Content and Child Protection

Background

There has been pressure on Congress and the Federal Communications Commission (FCC) to place restrictions on indecent and violent content on the airwaves for a number of years. Groups such as the Parents Television Council, Children Now, the American Psychological Association and the American Academy of Pediatrics are among the ranks of the critics. ANA understands the importance of protecting children from unsuitable entertainment. We have been active supporters of private sector solutions, such as rating systems and blocking technologies, as opposed to government limits on speech.

Status

This issue was placed front and center in the first half of 2004. The first hearings concerning broadcast indecency were held by the House Energy and Commerce Committee's Telecommunications and the Internet Subcommittee in late January. Just a few days later, the incident of the Super Bowl "wardrobe malfunction" took place. Suddenly, indecency was at the top of the Congressional agenda. Bills were introduced in the House and Senate to raise indecency fines, leading to more hearings and markups. The House bill, H.R. 3717, was sponsored by Rep. Fred Upton (R-MI/6). It would increase fines to \$500,000 per indecent incident, for both broadcasters and individual performers. Broadcasters who incurred multiple violations could be subject to license revocation. H.R. 3717 passed the House on a 391-22 vote in March. The Senate reported a bill out of committee in April which included additional and somewhat different provisions. This legislation, S. 2056, originally sponsored by Senator Sam Brownback (R-KS) would increase fines to \$275,000 for the first violation, \$375,000 for the second violation, and \$500,000 for the third. It included a provision authorizing fines against performers, but does not allow for license revocation.

At the markup, Senator Fritz Hollings (D-SC) added a major amendment pertaining to violent programming. This amendment was based on Senator Hollings' legislation S. 161, the Children's Protection from Violent Programming Act. The amendment requires the FCC to determine whether the current ratings system and v-chip technology are "effectively" protecting children from violent programming. If the FCC determines these measures are "insufficiently effective," the Commission must conduct a rulemaking to define "violent video programming," and then can restrict the hours during which such programs may be broadcast. Our response to Senator Hollings' amendment can be found at http://www.ana.net/pdf/cornrevere_hollingsamendment.pdf.

The Senate bill became bogged down by other issues and it looked unlikely that a bill would pass this year. In June, however, Senator Brownback and Senator Hollings added their proposals as amendments to the Defense Authorization bill. Both proposals were passed by the Senate, with Senator Hollings' amendment passing by unanimous consent. In the House-Senate conference on the Defense bill, however, the indecency and violence provisions were stripped out. The final bill passed in October without the media provisions.

The Senate also considered a bill introduced by Senator Joseph Lieberman (D-CT); Senator

Hillary Rodham Clinton (D-NY); Senator Rick Santorum (R-PA) and Senator Brownback, among others, that would authorize a \$90 million grant program to fund research into the “positive and negative roles of electronic media use.” This legislation would cover the “impact of television, computer games, and the Internet, on the cognitive, physical and psychological development of children.” The bill, S. 2447, or the Children and Media Research Advancement Act (CAMRA), calls for two initial pilot studies. The pilot studies would examine the role of media exposure on (1) cognitive and social development during infancy and early childhood; and (2) the development of childhood obesity, including the effects of advertising and lifestyle changes that occur with media use. It also would create a program within the National Institute of Child Health and Human Development to fund further research concerning the effects of media use on childhood development.

The House actively investigated media violence this year as well. Rep. Joe Baca (D-CA/43) introduced a version of Senator Hollings’ legislation in the House. Also, a group of thirty-nine House members, including Energy and Commerce Committee Chairman Joe Barton (R-TX), sent a letter to the FCC in March asking for an inquiry into television violence and its effects on childhood development. The FCC issued a Notice of Inquiry in July. Specifically, it asked for comment on the effectiveness of current blocking methods, such as the v-chip; whether further regulatory action is necessary; and how such regulations may be constrained by the First Amendment.

ANA, along with a number of advertising and media groups, had Bob Corn-Revere from the law firm Davis Wright Tremaine prepare a filing in response to the FCC’s request. Our filing urged the FCC to review the available literature on the subject of media violence, as many claims regarding its effect on children appear to be inaccurate or exaggerated. It included a report by Jonathan Freedman of the University of Toronto, who concluded from an examination of the available research that the evidence did not support the hypothesis that exposure to media violence generally leads to increased aggression. We also cited figures from the Department of Justice demonstrating the substantial decline in violent crime in society, during the same time period in which critics of violent entertainment claim exposure to violence on television and in movies increased dramatically. The report also noted that current technologies allow consumers to block programming they find undesirable. The analysis emphasized that any governmental restrictions based on content would raise serious First Amendment concerns. We concluded by noting that the FCC lacks the statutory authority to regulate violent entertainment. The filing can be viewed at:

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516732888.

In November, the FCC modified its rules regarding promotional spots during children’s programming. It redefined any program promotions not for educational programming as advertising. The FCC already imposes strict time limits on the amount of advertising that can be shown during children’s programming, and these new rules placed further limits in this area.

Interactive marketing also came under attack this year. The Center for Digital Democracy sent a letter to then-FTC Chairman Timothy Muris calling for an investigation into “powerful new digital marketing and branding applications targeting the vulnerable youth audience.” The letter called for a moratorium on interactive marketing while its effects on cognitive development were investigated.

ANA's Position

Advertisers believe children deserve special protection in our society. Nevertheless, this protection must not be obtained through censorship of legally protected speech. We strongly opposed the Hollings amendment, and sent a letter to the Senate Commerce Committee highlighting its unconstitutional aspects. The Hollings legislation would have effectively put the FCC in the position of national television censor. We also helped develop a filing for the FCC detailing the constitutional issues surrounding proposed restrictions on violent programming. We remain supportive of private sector initiatives, including ratings systems and v-chip technology that puts parents, not government, in control of the types of entertainment that enters the home. ANA also has been proactive in sponsoring family-oriented entertainment through the Family Friendly Programming Forum. More information about the forum can be found on our website, at <http://www.ana.net/family>.

Direct-to-Consumer Prescription Drug Advertising

Background

Direct-to-consumer prescription drug advertising is often cited by critics as one of the contributing factors to the high cost of prescription drugs. However, studies from diverse groups like the National Medical Association (NMA), the National Consumer's League (NCL) and the Food and Drug Administration (FDA) in fact have demonstrated the substantial benefits of DTC prescription drug advertising.

Status

In 2003, one of the big issues before Congress was adding a prescription drug benefit to Medicare. In 2004, it was the reimportation of prescription drugs. In both cases, an effort was made to inject restrictions on DTC prescription drug advertising into the debate. The most troubling proposal this year came from Senator Charles Grassley (R-IA), the Chairman of the Senate Finance Committee. Senator Grassley is a long time supporter of the advertising industry in the Senate. Nevertheless, he included in his reimportation bill, the Reliable Entry for Medicines at Everyday Discounts through Importation with Effective Safeguards Act of 2004 (or REMEDIES Act, S. 2307), a provision to take away the tax deduction for advertising expenses from any company that took a "direct or indirect" action to impede reimportation. Companies that did not take such actions, on the other hand, would get a tax credit on research and development (R & D) expenses.

In response to Senator Grassley's proposal, we submitted a memorandum written by Professor Burt Neuborne of the New York University School of Law, a noted First Amendment scholar and litigator, to members of the relevant House and Senate committees. Professor Neuborne's memo stated that "any effort to condition the tax deductibility of advertising expenses on a taxpayer's certification of compliance with government policy would violate the First Amendment." He also noted that, in this particular case, the "penalized speech is unrelated to the taxpayer's conduct."

Senators Olympia Snowe (R-ME) and Ron Wyden (D-OR) also introduced a reimportation bill that would have disallowed the tax deduction for prescription drug advertising (S. 2053), but it did not include the tax break for R & D expenses.

Senator John Edwards (D-NC), who was the Democratic candidate for Vice President, also resumed his attacks on DTC prescription drug advertising. In May, he introduced a bill, the Direct-to-Consumer Prescription Drug Advertising Act of 2004 (S. 2445), that was similar to the two amendments he introduced in 2003 to the Medicare drug benefit bill. These amendments were both soundly defeated by bipartisan majorities on the Senate floor. His bill would have required a balance between the "aural and visual" presentations between benefit and risk information in DTC prescription drug ads, and a comparison of the advertised drug's effectiveness in comparison with other, similar drugs. These massive disclosure requirements would have made DTC advertising on the broadcast media prohibitively expensive or impossible.

In August, Senator Edwards gave a campaign speech in which he criticized the drug industry for “spending more money on advertising than they’re spending on research and development.” In a statement, the campaign said a Kerry/Edwards administration would “lower health care costs by cracking down on misleading drug ads and making sure that seniors have access to objective information” including the comparative effectiveness of advertised drugs to other alternatives. While Senator Edwards has now retired from the Senate, it is likely similar attacks on DTC will be mounted in the future.

We continued to follow a number of proposals from the previous session of Congress that would have prohibited or restricted the tax deductibility of prescription drug advertising expenses. These proposals included:

- A bill introduced by Representative Jerrold Nadler (D-NY/8) to prohibit the deduction of expenses for DTC advertising (H.R. 149);
- Legislation by Representative Patrick Kennedy (D-RI/1) to limit the deduction to fifty percent of a drug company’s research and development expenses (H.R. 2640);
- Legislation by Representative James Crowley (D-NY/7) that would not only eliminate the deduction, but also would prohibit Chief Executive Officers of drug companies from making contributions to political parties or candidates for elective office (H.R. 1733);
- A bill (H.R. 1694) by Representative Michael Michaud (D-ME/2) that would have required the Secretary of Health and Human Services to negotiate rebate agreements with drug manufacturers to reduce the price of drugs for individuals without access to discounted drugs. If a company failed to enter into an agreement, that company would be denied the advertising tax deduction; and
- A bill (H.R. 3155) by Representative Pete Stark (D-CA/13) that would deny the tax deductibility of prescription drug advertising unless the ads provide a “fair balance” between benefit and risk information which would include far broader disclosures than are now required.

Fortunately, so far none of these proposals has been seriously considered by the House of Representatives.

On the judicial front, a coalition of groups including the AFL-CIO and the Congress of California Seniors filed suit against AstraZeneca in October in Los Angeles County (CA) Superior Court. The complaint alleged that the company violated the California Business and Professions Code in its marketing of Nexium, a prescription drug that treats acid reflux disease. Specifically, the groups contended that AstraZeneca’s actions were unfair and deceptive practices and that AstraZeneca was unjustly enriched through sales encouraged by advertising that “materially misrepresent[ed]” Nexium to consumers. It still remains to be seen whether this lawsuit will prove to be an opening salvo in a coordinated attack on DTC advertising under California’s broad Business and Professions Code.

ANA’s Position

We are opposed to restrictions predicated on penalizing advertisers for not adhering to “approved government behavior” by removing their ability to deduct advertising expenses.

Any type of proposal that says “do what the government wants, or else” would set a precedent for similar restrictions on other forms of “controversial” advertising. Additionally, the types of disclosure requirements set forth in Senator Edwards’ legislation would render DTC prescription drug advertising virtually impossible. The benefits of DTC prescription drug advertising have been widely noted. Attempting to restrict or prohibit this type of communication would not only be detrimental to public health, but would also violate the First Amendment.

Next Steps

ANA will try to ensure that the benefits of DTC prescription drug advertising are effectively communicated to government leaders, the medical community, and the public. As the debate over reimportation heats up, we will continue to work to keep any restrictions on DTC prescription drug advertising out of the legislation. This year, we added significantly to the debate with the development of Professor Neuborne’s legal memorandum. We will continue to undertake similar activities to ensure that the First Amendment rights of prescription drug advertisers are not violated.

Food Advertising and Obesity

Background

Obesity has been identified as the second leading preventable cause of death in the United States by the U.S. Surgeon General. While it is clear that a multifaceted solution will be needed in response to the problem, some have tried to single out advertising for primary blame for the rise in obesity rates, especially in regard to children. This point of view has led to virtually unprecedented attacks on food company advertising from the child protection angle. Many different groups, including the Kaiser Family Foundation, the Center for Science in the Public Interest (CSPI), and the American Psychological Association (APA), have been highly critical of the marketing of food to children.

Status

In March, the Senate Commerce Committee's Subcommittee on Competition, Foreign Commerce and Infrastructure held a hearing on the rise of obesity in children. ANA's CEO, Bob Liodice, testified at the hearing. The testimony (which can be viewed at http://www.ana.net/news/2004/03_02_04.cfm) addressed the advertising community's response to the serious problem of childhood obesity. The testimony noted the important steps taken by The Ad Council in increasing public awareness of the issue. It also detailed the self-regulatory procedures of the Children's Advertising Review Unit (CARU), which ensure that advertising messages to children remain truthful and non-deceptive. In addition, the testimony pointed out that the food industry has responded actively to consumer demand for products lower in cholesterol, fat and calories. Finally, the testimony noted that any attempt to tax, ban or restrict food ads would raise extremely serious First Amendment concerns, and provided evidence that bans in Sweden and the Canadian province of Quebec on children's advertising have failed to lower obesity rates in comparison to other areas without such restrictions. Also testifying at the hearing were representatives from the National Restaurant Association (NRA), the Grocery Manufacturers of America (GMA), the Kaiser Family Foundation, and CSPI.

In response to the hearing, ANA and the Grocery Manufacturers of America (GMA) conducted a study analyzing data on ads for food and restaurants on television. The data was provided by Nielsen Media Research and covered 1993 to 2003, the period in which obesity rates increased significantly. The analysis underlined the fact that, adjusted for inflation, overall spending on food and restaurant ads declined during the survey period. It also showed that the number of these ads seen by children declined in the same ten year period. These data strongly undermine claims that food and restaurant advertising is the cause of increased obesity. In fact, these data are consistent with the experience of the countries mentioned above, where bans or severe restrictions on children's advertising have failed to lower obesity rates in comparison to nearby countries where there are no restrictions on advertising to children. These data can be viewed at http://ana.blogs.com/jaffe/2004/06/data_highlights.html.

These data were first presented by ANA Executive Vice President Dan Jaffe at a Cato Institute panel on the marketing of food to children. The panel also included Todd Zywicki, then Director of the Federal Trade Commission's Office of Policy Planning, who concluded that banning ads would be "impractical, ineffective, and illegal."

Also, the National Advertising Review Council released a 92-page white paper in May which reviewed the ongoing efforts of both CARU and the National Advertising Division in regulating food advertising from 1974 to 2003 (<http://www.narcpartners.org/narcwhitepaper.aspx>). The report attempted to increase public understanding of the work of both self-regulatory organizations in the food advertising area.

Senator Tom Harkin (D-IA) introduced what he termed a “comprehensive wellness initiative” to fight chronic disease and obesity. The legislation, S. 2558, is known as the Healthy Lifestyles and Prevention America Act, or the HeLP America Act. It targets two marketing categories: tobacco and food. In regard to food advertising, it would repeal the current restrictions on the unfairness rulemaking authority of the Federal Trade Commission. Instead, it would authorize the FTC to conduct a rulemaking to restrict the marketing of foods and beverages to children under age 18 if the Commission determines that “there is evidence that consumption of certain foods and beverages is detrimental to the health of children or it determines advertising to children to be unfair or deceptive.” Under the legislation, the Secretary of Health and Human Services could ban advertising for certain foods in schools if it is determined that the consumption of the food is detrimental. It also proposes grant programs for schools to establish “a healthy nutritional environment.”

Also, Senator Ted Kennedy (D-MA) introduced S. 2894, the Prevention of Childhood Obesity Act. The bill requires the Institutes of Medicine (IOM) to make recommendations on national guidelines for advertising and marketing practices that reduce the exposure of youth to advertising of foods of “poor or minimal nutritional value.” It also calls for a national summit involving educators, public health and behavioral science professionals, child advocacy groups, and advertising and marketing representatives to consider plans for the implementation of the guidelines. The most serious provision of the bill, however, would allow the FTC to impose fines for violations of the guidelines.

On the state level, a blue-ribbon panel established in Maine to consider steps to address obesity called for bans and taxes on advertising for “foods of poor nutritional value.” ANA submitted testimony in opposition to these recommendations. The Commission voted on its final recommendations in November. It unanimously opposed taxing food advertising. However, it authorized the state Attorney General and Bureau of Health to evaluate advertising for foods directed at children 12 and under, and to recommend whether the ads can and should be restricted. It also directed a letter to Maine’s Congressional delegation recommending national limits on food advertising to children.

ANA’s Position

While we take the obesity problem very seriously, we believe that banning advertising will not work. An approach that affirms personal responsibility, increases nutritional education and encourages physical activity is the best way to combat the problem. We support the activities of the American Council on Fitness and Nutrition (ACFN), which is contributing greatly to the effort to develop such an approach. We also support The Ad Council’s continuing public service campaigns against obesity. The self-regulatory programs of both CARU and NAD, backed up by strong existing federal regulatory authority at the Federal Trade Commission (FTC) are sufficient in protecting the public from false and misleading advertisements. Almost certainly, a ban on food ads would not stand up to a court challenge on First Amendment grounds.

Next Steps

The critics of food advertising are growing. There will be continued pressure on the food industry unless obesity rates decline. In 2004, we tried to respond to the critics with hard data demonstrating that food ads are not to blame for increased obesity rates in the U.S. In fact, advertising has played an important role in alerting the public to the ever increasing number of low fat, low calorie options that are rapidly being brought into the marketplace to meet consumer demands. We will continue to work with GMA and our other industry partners to answer the criticisms in this area and ensure that truthful and non-deceptive food advertising retains its legal protections.

Alcohol Beverage Advertising

Background

Alcohol beverage advertising continues to be controversial. Critics, including the Center for Science in the Public Interest (CSPI), the American Medical Association (AMA) and Mothers Against Drunk Driving (MADD) charge that alcohol beverage ads encourage underage drinking and call for its regulation or prohibition. A number of surveys on teen attitudes, however, have found that advertising of alcohol products does not rank as a major factor in the decision by teenagers to consume alcohol.

Status

Congress continued to focus on alcohol beverage advertising in 2004. In March, Rep. Tom Osborne (R-NE/3) introduced a resolution, H.Res. 575, which called on the National Collegiate Athletic Association (NCAA) to end alcohol beverage advertising on its radio and television broadcasts. The sponsors of the resolution claimed that such an action would help reaffirm the college community's commitment to discourage underage drinking. ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), sent a letter to members of the House Education and the Workforce Committee urging them not to co-sponsor Rep. Osborne's resolution. Our letter argued that the audience for NCAA broadcasts was overwhelmingly adult, and that the industry takes great care to insure their ads are seen by appropriate audiences. The letter also noted that the Federal Trade Commission, in its recent survey of the alcohol beverage industry, found that great strides had been made in the area of "ad placements," as well as the "added attention to the issue of ad content." Our letter concluded by stating that if the NCAA took the action recommended by the resolution, it would be holding alcohol beverage advertisers to a restrictive standard that does not apply to any other advertising.

In July, identical bills were introduced in the House (H.R. 4888) and Senate (S. 2718) that incorporated the Osborne resolution, but included some new elements. This legislation is known as the Sober Truth on Preventing Underage Drinking Act (or the STOP Underage Drinking Act). The bill's findings criticized the alcohol beverage industry and cited figures from studies performed by the Center on Alcohol Marketing and Youth (CAMY) regarding advertising spending and placement. Significantly, the bill called for research on "the type and quantity of alcoholic beverages consumed by underage drinkers, as well as information on brand preferences of these drinkers and their exposure to alcohol advertising."

CAMY issued a new study in October that again criticized the alcohol beverage industry, claiming that alcohol beverage advertising on television had "exploded" between 2001 and 2003. The study, however, noted that usage of alcohol beverage products by underage youth had remained "flat" over more than a decade, which appeared to undercut the argument that advertising rates for this category were enticing young people to drink. The study also criticized the industry for its placement practices, stating that the industry would need to make a "major shift" in strategy to comply with its new voluntary marketing code which mandates a 70% adult audience level for all alcohol beverage ads.

There were important developments at the state level as well, specifically in Oregon. A group called the Oregon Coalition to Reduce Underage Drinking (OCRUD) submitted a petition in February to the state's Liquor Control Commission, asking it to codify various parts of the alcohol beverage industry's self-regulatory marketing codes. Among the proposals, the petition called on the Liquor Control Commission to restrict alcohol beverage ads in any medium in which youth ages 12 to 20 comprise more than 30% of the audience, and to restrict alcohol beverage billboard advertising within 500 feet of schools, playgrounds or houses of worship. We filed comments with the Liquor Control Commission, stating that the proposal would violate the First Amendment and the Oregon Constitution. By codifying a 30% placement standard, this proposal would have precluded alcohol beverage ads in many popular television programs and publications that have a predominantly adult audience. We also argued that in a series of recent cases, the courts have struck down similar limits as undue restrictions on speech. OCRUD withdrew the petition before the Liquor Control Commission could act. Our letter can be viewed at <http://www.ana.net/pdf/OregonCommissionletter.pdf>.

We continued to follow legal developments in this area in 2004. Late last year and early this year, five cases were filed in the District of Columbia, California, North Carolina, Colorado, and Ohio challenging the marketing practices of the alcohol industry. Four of the suits claim that alcohol beverage companies have undertaken a "long running, sophisticated and deceptive scheme" to market alcohol beverages, specifically malt beverages, to children, and have illegally earned billions of dollars in profits because of this activity. Another suit targets the marketing practices of alcohol beverage companies more generally. All of these suits are still pending.

One important suit was decided in our favor this year. In *The Pitt News v. Pappert*, the Third Circuit Court of Appeals found that a Pennsylvania law prohibiting alcohol beverage advertisements in student run newspapers was precluded by the First Amendment. The court determined that these restrictions could not be upheld due to the fact that the vast majority of students and faculty on campus were of legal drinking age.

A more detailed description of these suits can be found in the section entitled "Key Court Cases," beginning on page 34.

ANA's Position

Alcohol beverages are legal products for adults. Therefore, truthful and non-deceptive information regarding alcohol beverage products directed at adults cannot be restricted or prohibited without raising serious First Amendment concerns. The alcohol beverage industry has taken great care in devising self-regulatory codes to ensure its advertisements are seen by the appropriate audience. In fact, these self-imposed requirements are more restrictive than any Congress could legally impose. The FTC has commended the industry for these actions. We also are supportive of public service advertising activities to discourage underage drinking and alcohol abuse through programs sponsored by the Beer Institute and the Century Council, among other industry groups. Also, the Ad Council carries out significant activities in this area. These types of programs can help address the problem of underage drinking without placing limits on commercial speech.

Next Steps

Groups like CSPI, MADD and CAMY almost certainly will continue to pressure Congress to take action against alcohol beverage advertising. We will continue to work with Congress, the FTC and industry groups to ensure that this advertising is carried out truthfully and non-deceptively, and see that any pressure campaigns do not result in inappropriate restrictions or prohibitions on alcohol beverage advertising. We also will continue to follow closely the large number of lawsuits currently working their way through the courts, and respond, where necessary.

Tobacco Advertising

Background

Tobacco advertising has changed considerably since the Master Settlement Agreement between the states and the tobacco companies in 1998. Under that agreement, the tobacco companies voluntarily agreed to halt practices such as the use of cartoon characters in ads, the use of company logos on non-tobacco products, and product placement in movies and on television. The companies also severely restricted their use of outdoor advertising. In addition, the Food and Drug Administration attempted to promulgate regulations in 1996 that would have gone much further than the voluntary agreement. The Supreme Court threw out the FDA's proposed regulations in 1998 because the Court held that Congress had not given the FDA the authority over tobacco products and advertising. The authority over tobacco advertising still belongs to the Federal Trade Commission.

Status

The most serious effort yet to grant the FDA authority over tobacco products and advertising took place in 2004. In May, Senator Mike DeWine (R-OH) and Senator Edward Kennedy (D-MA) introduced legislation (S. 2461) to give the FDA authority over the manufacture, marketing and sale of tobacco products. This legislation would require the FDA to publish an interim final rule within 30 days of enactment that is very similar to the 1996 rules. In fact, the new restrictions would go further than those rules, in setting detailed specific requirements for the text of warning labels and the text and color of advertisements. In addition, the bill would allow state and local governments to impose "specific bans or restrictions on the time, place and manner, but not content" of tobacco ads. A bill covering many of these areas (H.R. 4433) was introduced in the House by Rep. Tom Davis (R-VA/11).

Along with the American Association of Advertising Agencies and the American Advertising Federation, we wrote a letter to the Senate Health, Education, Labor and Pensions Committee and the Senate Commerce Committee, stating our strong opposition to the bill. Our letter called the restrictions "sweeping, unprecedented," and a de facto ban on advertising in violation of the First Amendment.

At the same time, Congress also was working on legislation to end the Depression-era agricultural tobacco quota program through a "buyout" that was meant to help tobacco farmers. In an attempt to move this proposal this year, the House attached the buyout provision to H.R. 4520, a bill that would reform certain corporate tax practices that were subject to European Union sanctions. The House then passed this package and sent it on to the Senate. The buyout had the strong support of many tobacco state lawmakers in both the House and the Senate. In a further effort, to get the support of non-tobacco state Senators, the FDA tobacco advertising provisions were also added to it. When the House and Senate held a conference on the bill in October, the FDA provisions were stricken from the bill, but the buyout provision remained. The final version of the bill passed both Houses of the Congress later that month.

In other developments in this area, Senator Tom Harkin (D-IA) introduced wide-ranging health legislation in June that dealt comprehensively with tobacco products and advertising. His legis-

lation, the Healthy Lifestyles and Prevention America Act (S. 2558) would give FDA regulatory authority over all tobacco products. It would also disallow the federal tax deduction for tobacco advertising, and would fund a national media campaign designed to reduce the use of tobacco products.

ANA's Position

ANA takes no position on FDA regulatory authority over tobacco products or on the tobacco buyout. We did, however, strongly oppose the advertising restrictions in both bills. The FDA regulations have been roundly criticized as unconstitutional by a wide variety of legal scholars, including Judge Robert Bork; Burt Neuborne, Professor of Law at New York University School of Law; Rodney Smolla, Professor of Law at the College of William & Mary; Laurence Tribe, Professor of Law at Harvard University; and First Amendment expert Floyd Abrams. All agree that these regulations, if enacted, would raise serious First Amendment concerns. The regulations will surely be challenged in court. Also, the precedent such regulations could create for other areas of advertising would be quite dangerous. These regulations would be the most restrictive ever imposed on any advertising category. We had constitutional experts at the Patton Boggs law firm develop a comprehensive point-by-point analysis of these proposals. Their 10-page analysis concluded that the restrictions are “so sweeping as to be almost a total ban” on advertising for a legal product, and would allow the states to go even further in restricting advertising. A copy of the memorandum can be viewed at <http://www.ana.net/pdf/TobaccoControlAct.pdf>.

Next Steps

The U.S. Supreme Court has long recognized the commercial speech rights of advertisers. Any of these regulations must meet the *Central Hudson* test which requires that among other things, advertising restrictions must be “no more extensive than necessary.” We will continue to oppose massive restrictions on tobacco advertising if legislation is introduced in the new Congress.

International Developments

Background

ANA is a member of the World Federation of Advertisers (WFA), which brings together 50 national advertising associations and 30 international advertisers. WFA, “the voice of advertisers worldwide,” works to foster an environment where advertisers around the world are able to responsibly promote their products. It endorses self-regulatory systems and global best practices for advertising. ANA has worked with WFA on a variety of issues, including food advertising, marketing to children, and privacy. This past May, Dan Jaffe, ANA’s Executive Vice President of Government Relations, participated and spoke at a conference in Santiago, Chile sponsored by the WFA and the Asociación Nacional de Avisadores of Chile, which focused on a variety of worldwide advertising issues.

Status

In May, ANA submitted comments to the Codex Committee on Food Labeling (CCFL), urging it not to include advertising within the Committee’s Draft Guidelines for Use of Nutrition and Health Claims. The Codex Alimentarius Commission was created in 1963 by the World Health Organization (WHO) and the Food and Agriculture Organization of the United Nations (FAO) to develop food standards, guidelines and codes of practice. For several years, the Committee on Food Labeling has been working on draft guidelines regarding the use of health claims on food product labels. The Canadian government proposed that the guidelines be extended to include advertising. Our comments can be viewed at <http://www.ana.net/news/2004/Codex%20statement%205.7.04.doc>.

Our statement noted the difference between advertising and labeling, and argued that the health and nutrition information provided to consumers in advertising and labeling should be consistent, but need not be identical. The WFA and the Association of Canadian Advertisers (ACA) joined us in opposition. The United States and European Union delegations reached a compromise proposal in which current jurisdictional rules under each country’s legal structure are maintained. Unfortunately, advertising remains on the agenda for the next CCFL meeting.

We also made our members aware of a proposal in France to restrict food advertising. The options included establishing a quota limiting the number of ads for “unhealthy” foods during each ad break; banning ads for “unhealthy” foods and beverages directed at children during certain viewing hours; and imposing a tax on “unhealthy” foods and beverages to pay for anti-obesity programs. The amendment added to the Public Health Bill in July would require that ads for manufactured food products and drinks with added sweeteners have a specific health message.

A report by Britain’s Office of Communications (Ofcom), the main communications regulator in that country, issued a report that found the direct effect of advertising on food choice was “modest” when compared to other factors. It ruled out a ban on food ads. Despite Ofcom’s findings, a report issued by the British Department of Health in November said a “strong case for action” to restrict food ads had been built, and threatened action by 2007 if industry did not make changes. The report also proposed a “signposting” system for food labeling to indicate to

consumers which foods are considered healthier. The system is expected to include red, green or amber indicators to display the alleged relative health benefits of various foods.

A ban on food ads was also rejected by the Australian government. Ireland, which is presently undergoing a revision of its children's advertising code, has been pressured to adopt a ban on food ads to children. The new code was launched in October and did not include a ban.

Next Steps

Any attempts outside the United States to limit or ban certain advertising categories need to be closely monitored. These attempts, if successful, may inspire similar efforts in this country. We will continue to work with the WFA and our member companies to ensure the continued protection of the rights of advertisers worldwide. Like WFA, we continue to believe that self-regulatory regimes, like the National Advertising Review Council (<http://www.narcpartners.org>) in the United States are the best way to ensure that advertising remains truthful and non-deceptive.

Key Court Cases

Background

The courts increasingly are hearing cases that deal with critical issues surrounding the commercial speech rights of advertisers. Legislators and regulators often are willing to disregard the First Amendment in the pursuit of political objectives. The courts, therefore, serve as the ultimate safety net for advertisers. ANA has been a participant in nearly every advertising case that has come before the U.S. Supreme Court, and actively follows commercial speech cases at all levels of the judicial system.

Below are the major cases that were pending or resolved in 2004. Updates on pending cases and summaries of new cases are posted regularly in the government relations section of our website, at <http://www.ana.net>.

Alcohol Beverage Advertising

Class Action Suits: Class action lawsuits have been filed in four courts across the country regarding the alcohol beverage industry's advertising and marketing of malt beverages. Three of the cases allege a "long-running, sophisticated, and deceptive scheme by certain alcohol beverage manufacturers to market alcohol beverages to children and other underage consumers" and claim the manufacturers have reaped billions of dollars in profits because of the alleged deception. The first case to be filed was *Hakki v. Zima Company*, filed in the District of Columbia Superior Court on November 14, 2003. This case was followed by *Kreft v. Zima Company*, filed December 3, 2003 in Denver (CO) Superior Court and by *Wilson v. Zima Company*, filed in Mecklenburg County (NC) Superior Court on January 13, 2004. Finally, a similar suit, *Eisenberg v. Anheuser-Busch Co.* was filed on April 30, 2004 in Cuyahoga County (OH) Superior Court. These four cases were filed by a law firm in which David Boies is the managing partner. Boies represented former Vice President Al Gore in the 2000 election recount in Florida. Another case, *Goodwin v. Anheuser-Busch Co., Inc. and Miller Brewing Co.*, filed in Los Angeles (CA) Superior Court on February 3, 2004, specifically targets the marketing practices of the two companies and includes advertising for other products, not just malt beverages. The plaintiffs in this case cite the many studies carried out by the Center on Alcohol Marketing and Youth at Georgetown University (CAMY) in its argument that the industry has targeted underage drinkers.

Pitt News v. Pappert: This case creates important precedents for advertisers. It arose from a 1996 Pennsylvania law that banned the publication of alcohol beverage ads, including ads advertising drink specials, in publications printed "by, for or on behalf of" educational institutions. *The Pitt News* is the student-run newspaper at the University of Pittsburgh. It subsequently lost advertising revenue after its regular alcohol beverage advertisers pulled their ads in response to the law. It sued the commonwealth in the United States District Court alleging the state violated its First Amendment rights. After two appeals, the Court of Appeals for the Third Circuit ruled in July that the law was an "impermissible restriction on commercial speech," and it was "presumptively unconstitutional because it targeted a

narrow segment of the media.” The court cited both the *Central Hudson* and *Lorillard* decisions in reaching its ruling. It noted that a large majority of those who received the ads were 21 or older. The U.S. Supreme Court’s *Central Hudson* decision established that the government must have a compelling interest to restrict commercial speech. Any restrictions on commercial speech must directly advance the government’s interest, and the restrictions must be no more restrictive than necessary to serve the government’s interest. In *Lorillard*, the Supreme Court extended the fourth prong of the *Central Hudson* test, holding that any restrictions on commercial speech must be narrowly tailored. For these reasons, the commonwealth’s ban was struck down.

Direct-to-Consumer Prescription Drug Advertising

AFL-CIO v. AstraZeneca Pharmaceuticals L.P.: A coalition of groups filed suit against AstraZeneca on October 18, 2004 in Los Angeles County (CA) Superior Court, alleging the company violated the California Business and Professions Code in its marketing of Nexium. Nexium is a prescription drug that treats acid reflux disease. Specifically, these groups contend that AstraZeneca’s actions were unfair and deceptive practices that were unjustly enriched through sales encouraged by advertising that “materially misrepresented[ed]” Nexium to consumers.

The coalition includes the AFL-CIO, the Congress of California Seniors (CCS) and the California Alliance for Retired Americans. Their complaint claims that:

- AstraZeneca promoted Nexium as “more powerful,” “more effective,” and a significant improvement over Prilosec, the drug it replaced, which it alleges was false;
- It failed to disclose an unpublished clinical study that showed Nexium was no more effective than Prilosec at an equivalent dose;
- Its conduct in promoting Nexium to doctors and consumers without mentioning this data created demand that would not have otherwise existed through inducing doctors to prescribe and consumers to purchase the medication;
- Its promotional materials for doctors were unfair and deceptive; and
- AstraZeneca was unduly enriched because of the advertising that promoted the product.

The suit also explicitly mentions the often-heard criticism of DTC advertising that “it encourages patients to demand high-cost prescriptions for ailments that could be treated effectively with lower cost options.” The complaint ignores, however, the numerous studies from the FDA, National Medical Association (NMA) and the National Consumers League (NCL) that tout the benefits of direct-to-consumer prescription drug advertising. It also ignores the fact that the doctor, not the patient, makes the final decision on whether to prescribe a drug.

The question remains whether this case is limited in scope or is the first sign of a broader strategy of assault on prescription drug advertising utilizing the California Business and

Professions Code. In this regard, both the Unfair Competition Law and the False Advertising Law contained in the California Business and Professions Code, which are alleged to be violated here, were the predicates for the *Nike* case. The California Supreme Court ruled against *Nike*, and the U.S. Supreme Court failed to resolve the matter, returning it to the lower courts for further consideration. More about the Nike case and its ramifications for advertisers can be found at :

http://www.ana.net/news/2004/01_07_04.cfm.

“Do-Not-Call”

Mainstream Marketing Services, Inc. v. Federal Trade Commission: The first case to block implementation of the Federal Trade Commission’s “do-not-call” list was *U.S. Security v. Federal Trade Commission*. The issue in that case was whether or not the FTC had been granted the authority by Congress to create the registry. That issue became moot almost immediately through Congressional passage of a bill granting the FTC explicit authority in this area. The same day Congress acted, however, another judge issued a ruling that directly confronted the First Amendment issues surrounding the registry. Judge Edward W. Nottingham of the United States District Court for the District of Colorado ruled that the FTC’s rules were in violation of the First Amendment. Judge Nottingham applied the test set forth in the United States Supreme Court’s *Central Hudson* decision, and found the rules amounted to an unconstitutional government restriction on lawful and truthful commercial speech. He ruled that because the registry limited commercial speech, and not political or charitable speech, it was favoring one category of speech over another solely based on its content. The FTC asked for a stay of the decision. The request was denied by the District Court, and the Commission appealed to the U.S. Court of Appeals for the Tenth Circuit, which granted the stay on October 7, 2003. The FTC was allowed to begin enforcement of the list at that time.

The Tenth Circuit Court, however, reversed the decision of the District Court on February 17, 2004. The Appeals Court ruled that the list did advance a substantial government interest, by protecting consumer privacy, and protecting consumers from fraud and abusive practices. It also held that the list was narrowly tailored, because it did not block speech from willing recipients, just those who chose to put their number on the list. The Court dismissed the lower court’s argument that the list favored one form of speech over another, stating that the First Amendment “does not require that the government regulate all aspects of a problem before it can make progress on any front.” It cited statistics that the court claimed demonstrated that unwanted commercial calls and calls from companies with an established business relationship were less of a problem than calls from charities or political organizations. The U.S. Supreme Court decided not to hear the case in October, thereby, in effect, upholding the lower court decision.

Tobacco Advertising

State of California v. R.J. Reynolds Tobacco Company: On June 6, 2002, the Superior Court of California for San Diego County ruled that R.J. Reynolds Tobacco Company violated the 1998 Master Settlement Agreement with the state Attorneys General by indirectly targeting

youth in its tobacco advertising. The court ruled that RJR made no attempt to change its print advertising campaign in a way that would stop it from indirectly targeting minors. It also ruled RJR avoided doing research to determine the extent to which its print advertisements in magazines such as *Sports Illustrated* and *Rolling Stone* reached a youth audience. RJR was fined \$20 million and was ordered to take certain actions to comply with the terms of the MSA. RJR appealed to the California Appeals Court for the Fourth Appellate District.

The Appellate Court returned its decision on February 25, 2004. While it differed with the lower court's analysis of the Master Settlement Agreement, it affirmed the Superior Court's ruling except as to the sanctions imposed. It remanded the decision on sanctions to the lower court.

In December, R.J. Reynolds settled the suit. Under the terms of the settlement, R.J. Reynolds will not advertise in publications with a 15% or more readership under 21. R.J. Reynolds also agreed to pay a \$11.4 million fine.

Beef Marketing Case

Veneman v. Livestock Marketing Association; Nebraska Cattlemen v. Livestock Marketing Association: The U.S. Supreme Court heard two First Amendment challenges to the federal law requiring beef producers to pay \$1 per head of cattle for industry-wide promotional campaigns. The lawsuits were brought by a group of small ranchers, which argued that the mandatory assessments for the "Beef: It's What's for Dinner" campaign, violated their free speech rights. The Eighth Circuit Court of Appeals agreed and the Supreme Court heard oral arguments on these cases this fall. A decision is expected early next year.

The Supreme Court's track record on these commodity-marketing cases has not been highly predictable. The Court upheld the federal program for California peach producers in 1997, but struck down a similar assessment on mushroom growers in 2001. The decisions so far appear to hinge on how extensive the regulations are for the particular product. If the various stages of production and sale are heavily regulated, the Court has treated the marketing rules as incidental to the economic regulation of the product. However, if the rules focus more on marketing than the other aspects of production and sale, the Court has been more receptive to First Amendment claims. The Court is clearly still in the process of developing criteria for various commodity-marketing programs.

Coalitions

ANA remains an active member of The Advertising Coalition; the Freedom to Advertise Coalition (FAC); the State Advertising Coalition (SAC); the Coalition for Health Care Communication (CHC); and the American Council for Fitness and Nutrition (ACFN). These coalitions enhance the efforts of the diverse groups that share the common interest of protecting the rights of advertisers. They provide the industry with a united front when lobbying Congress and government agencies, and serve to strengthen our individual efforts.

The Advertising Coalition

The Advertising Coalition was established in 1988 to direct the fight against federal advertising tax proposals. It has since expanded its scope to include general advertising issues. There are currently eight member associations including: the ANA; the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Grocery Manufacturers of America (GMA); the Magazine Publishers of America (MPA); the National Association of Broadcasters (NAB); the National Cable & Telecommunications Association (NCTA); the Newspaper Association of America (NAA); and the Pharmaceutical Research and Manufacturers of America (PhRMA). In 2004, The Advertising Coalition was active in the debate over the attempt to limit the tax deductibility of direct-to-consumer prescription drug advertisements. We have also used our participation in The Advertising Coalition in responding to a number of state-level ad tax battles.

The Alliance for American Advertising

Leaders in the advertising and media industries have created The Alliance for American Advertising (AAA) to present to policymakers and to the general public a forceful and informed profile of an industry committed to responsible advertising. The Coalition will demonstrate that the nation's advertisers, manufacturers, and advertising and media professionals, are community and national leaders who are prepared to increase their already significant efforts to educate the public on the general causes of obesity and support effective ways to reverse this trend.

The ANA, along with the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); and the Grocery Manufacturers of America (GMA) are charter members of the AAA. The membership is likely to grow in the next year as both industry members and association members have been invited to join

Freedom to Advertise Coalition

The Freedom to Advertise Coalition (FAC) is an informal coalition whose purpose is to oppose proposals that restrict truthful and non-deceptive advertising for any legal product or service. FAC's members include the ANA and the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Magazine Publishers of America (MPA); the Direct Marketing Association (DMA); the Newspaper Association of America (NAA); and the Outdoor Advertising Association of America (OAAA).

State Advertising Coalition

The ANA, the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) formed the State Advertising Coalition (SAC) in 1986 to provide information and resources necessary to combat overly restrictive state and local advertising proposals. Since its formation, SAC has responded to more than 100 ad tax proposals in over 40 states. 2004 was no exception, as we again faced a large number of state ad tax proposals (see page 9 for a discussion of these proposals).

Coalition for Healthcare Communications

The Coalition for Healthcare Communications (CHC) was formed in 1991 for the purpose of defending organizations that dedicate their time to provide truthful information about pharmaceutical and medical products without inappropriate government intervention. The CHC advocates the flow of this information to health professionals and consumers for educational purposes so that prescription drugs and medical devices can be used efficiently and safely. In 2004, CHC addressed these concerns with a filing to the Food and Drug Administration regarding information overload in DTC advertisements.

The members of CHC include the ANA; the American Association of Advertising Agencies (AAAA); the American Advertising Federation (AAF); American Business Media; the American Medical Publishers Association (AMPA); the Association of Medical Publications (AMP); the Healthcare Businesswomen's Association (HBA); the Healthcare Marketing and Communications Council (HMC Council); the Medical Marketing Association (MMA); the Midwest Healthcare Marketing Association (MHMA); and the Public Relations Society of America (PRSA). More information about the CHC can be found at <http://www.cohealthcom.org>.

American Council for Fitness and Nutrition

The American Council for Fitness and Nutrition (ACFN) was formed in 2003 to respond to the challenges posed by obesity and overweight in the United States. Its mission is to "advocate comprehensive, long-term strategies and constructive public policies for improving the health and wellness of all Americans, particularly youth, by promoting science- and behavior-based solutions focused on the critical balance between fitness and nutrition." The ACFN carries out these programs by advocating these positions to federal and local officials. It also promotes activities by its members that encourage consumers in reaching the correct balance between fitness and nutrition, engages in ventures with public and private entities to promote fitness and nutrition programs, and supports scientific research that looks into achieving a balance between fitness and nutrition.

The ACFN has over 50 members, including food and beverage manufacturers, restaurant chains, and trade associations representing a variety of industries involved in the production and marketing of food products. ANA is on the ACFN's Executive Board. More information about the ACFN can be found at <http://www.acfn.org>.